92-1755

Supreme Court, U.S.
FILED
APR 7 - 1993
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1993

DONALD R. LAMBORNE, *et al.*,

Petitioners,

V.

BRADLEY K. HAYNES, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

Donald R. Lamborne
210 Tomahawk Trail
Winchester, Virginia 22602
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pro se

Appellate Printing Services • 523 East Main Street • Richmond, VA 23219 • (800) 642-7789

QUESTIONS PRESENTED FOR REVIEW

Did the Circuit Court of Frederick County, Virginia and the Supreme Court of Virginia err (re: record number 921009, No. L89-118 and L89-119) in denying the petitioners' rights to a trial on the merits of their filings, thus depriving them of their constitutional rights as guaranteed in the Fifth, Seventh, and Fourteenth Amendments and in Article III of the Constitution of the United States?

LIST OF ALL PARTIES

The names of all parties with addresses and telephone numbers of counsel of each party are:

FIRST VIRGINIA BANK - SHENANDOAH VALLEY
AND CHARLES R. CASH, PRESIDENT, Defendants
Counsel: Kathleen Barlow, Esq.
One First Virginia Plaza
6400 Arlington Blvd., #420
Falls Church, Virginia
(703) 241-4489

BRADLEY K. HAYNES
AND B.K. HAYNES CORPORATION, Defendants
Counsel: George W. Johnston, III, Esq.
P.O. Box 2740
Winchester, Virginia 22601

Kermit L. Racey, Esq.
P.O. Box 250
Woodstock, Virginia 22664

ESTATE OF NICHOLAS C. MILLER,
JOHN THORPE RICHARDS, Executor, Defendant
Counsel: William E. Schmidheiser, III, Esq.
100 South Mason Street
Harrisonburg, Virginia 22801

THE CIRCUIT COURT OF FREDERICK COUNTY
HONORABLE JAMES L. BERRY
Winchester, Virginia 22601

THE SUPREME COURT OF VIRGINIA
Supreme Court Building
Richmond, Virginia 23219

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AUTHORITIES

THE CONSTITUTION OF THE UNITED STATES:

- FIFTH AMENDMENT 3,4
- SEVENTH AMENDMENT 3,4
- FOURTEENTH AMENDMENT 3,4

BLACK'S LAW DICTIONARY, 6TH EDITION 4

Case No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1993

Donald R. Lamborne, *et al.*,

Petitioners,

v.

Bradley K. Haynes, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioners, Donald R. Lamborne, *et al.*, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Virginia which refused to reverse the decision of the Circuit Court of Frederick County, Virginia.

OPINIONS BELOW

The Circuit Court of Frederick County, Virginia handed down a decision on October 10, 1990 whiched held that the Petitioners' action against the Defendants was barred by res judicata (App. A-1) The Supreme Court of Virginia denied a petition for appeal on November 4, 1992 (App. A-4) and petition for rehearing on January 8, 1993 (App. A-5)

JURISDICTION

Petitioner seeks review of the judgment of the Supreme Court of Virginia which denied Petitioner's request to set aside the judgment of the Circuit Court of Frederick County, Virginia and grant a rehearing thereof.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution Provides:

> No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or pubic danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Seventh Amendment to the United States Constitution Provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

The Fourteenth Amendment to the United States Constitution Provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of lfie, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners Donald R. Lamborne, *et al.*, respectively pray that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia which refused to review and reverse the decision of the Circuit Court of Frederick County, Virginia, which held that the Petitioners' action against these Defendants was barred by *res judicata*, since the Defendants alleged that the matter had been fully adjudicated in the bankruptcy court. In fact, there was never any trial on the merits of your Petitioners' contentions, and the Petitioners were seriously damaged by the fraudulent acts of the individual Defendants.

Your Petitioners had requested a jury trial of their allegations showing the harm that was done them by the acts of the Defendants which were never considered at any time in the proceedings in the bankruptcy court. The issues in the bankruptcy court involved only the sale of certain property and the fraudulent conduct of the Defendants was neither pled nor considered at any time in those proceedings.

Further, the parties were not the same, so that there was no opportunity for anything which might constitute *res judicata* or collateral estoppel. None of the parties to this litigation was before the bankruptcy court in its consideration of the sale of this property, which further establishes that there was no consideration of these issues nor could there be.

It is on this basis that your Petitioners allege that they have been denied their due process rights as guaranteed under the Fifth, Seventh and Fourteenth Amendments of the United States Constitution. The bankruptcy proceeding was appealed to the United States Court of Appeals for the Fourth Circuit, which simply dismissed the appeal on the grounds of mootness, since the sale had already been completed. The issues of the damage to your Petitioners was never addressed in any court.

As evidence of that, it would be noted that, in the proceedings in the bankruptcy court, neither Haynes nor Cash were ever either present or represented. It does not appear that there could possibly be due process in dismissing on the basis of *res judicata* and collateral estoppel an action where there was never any trial and where the defendant parties were not represented.

REASONS FOR GRANTING WRIT

The Petitioners filed two civil actions, number 890357 (as to Lamborne's) and 89-360 (as to Marjec, Inc.), in the Circuit Court of the City of Alexandria in July 1987. The Circuit Court proceeding was subsequently transferred to the Circuit Court of the County of Frederick. The two lawsuits alleged that the fraudulent acts and other torts committed by the five joint Defendants resulted in diminution of certain property rights held by the Petitioners.

The Defendants used as their principal defense collateral estoppel and *res judicata*, contending that the matters were tried in the Federal Court in the still pending bankruptcy proceedings.

This is not true, as evidenced in part by the following:

The original filing was transferred by the Petitioners to the Circuit Court of Frederick County; thus, it would be the "Trial Court". Black's 6th Edition, defines "trial court" as: "The court of original jurisdiction where all evidence is first received and considered; the first court to consider litigation."

It was in this court that a jury trial was requested, a right guaranteed by the Seventh Amendment to the Constitution. None was granted. "Trial" as defined by Black's is "A judicial examination and determination of issues between parties to action, whether they be issues of law or of fact, before a court that has jurisdiction." There has been no trial.

There was no examination of all facts or issues, no witnesses, the right for interrogatories was voided by the trial court, and the Petitioners did not even testify. The Petitioners have been denied their due process rights as guaranteed under the Fifth, Seventh and Fourteenth Amendments of the Constitution.

The Defendants claim the issues were tried in the Federal Court during the bankruptcy proceedings - - not in this suit. Now, what does the United States Court of Appeals (Fourth Circuit) say about this? In their unpublished opinion of November 12, 1987, No. 87-2532 (Defendants' Exhibit 3I), they write, "We grant the motion to dismiss for mootness" - - which has little or no relationship to the issues in the subject suit.

The Court further states:

> "Marjec did not object to the sale below, and did not question Haynes' good faith, so the court had no reason to address the issue. Marjec has not established

> that Haynes owed a fiduciary duty to Marjec. Nor has Marjec presented any evidence creating an inference of bad faith."

In essence, the Fourth Circuit says there was no litigation.

Very true, and of course not - - since there was no trial on the issues of this present suit - - no witnesses, no jury, none of the constitutional guarantees for the Petitioners.

To have been a trial (litigation) in the Federal Court, there would have had to have been litigants. Who were they? Haynes was not present in person or by counsel. Cash was not present in person or by counsel nor was the bank. So, how could there have been a trial, or litigation, if they were not there nor was any evidence proferred?

On the 22nd day of January, 1991, the leading defense attorney filed a brief in opposition to the petition for appeal (in this present case) to the Virginia Supreme Court, in which he stated, "On August 14, 1986, the Plaintiffs filed a Motion for Reconsideration making several wild, unsubstantiated allegations, and requesting - - "in referring to a reference in said Motion of some misgivings. How can it be "wild allegations" one moment, then a full blown trial the next? It must have been either one or the other. There was no trial in the Federal Court on the issues as involved in the subject suit and none has been permitted in the Circuit Court. The petitioner has further been denied his due process opportunity to present facts.

CONCLUSION

In view of the above facts, this Petitioner respectfully requests this honorable court to grant a writ of certiorari and reverse the decisions of the Virginia Supreme Court and the Circuit Court of Frederick County and remand the case for a trial on the merits.

Respectfully submitted,

/s/ Donald R. Lamborne
Donald R. Lamborne, *pro se*

VIRGINIA:

IN THE CIRCUIT COURT OF FREDERICK COUNTY

DONALD R. LAMBORNE, et al,	)	
Plaintiffs	)	
	)	AT LAW NO. 89-118
vs.	)	
	)	
FIRST VIRGINIA BANK-SHENANDOAH	)	
VALLEY et al,	)	
Defendants	)	
	)	
MARJEC, INC.,	)	
Plaintiff	)	
	)	AT LAW NO. 89-119
vs.	)	
	)	
FIRST VIRGINIA BANK-SHENANDOAH	)	
VALLEY et al,	)	
Defendants	)	

ORDER

This matter came on to be heard August 15, 1990 upon the praecipe of Bradley K. Haynes and B. K. Haynes Corporation. Upon due consideration of the issues between and among the parties and the briefs herein before filed, it is the opinion of this Court as set out in its letter opinion dated September 5, 1990 (a copy of which is attached hereto) that:

> Counts I, II, and III of Bill of Complaint designated a breaches of fiduciary duty as well as count VI all sound in fraud. Plaintiffs' brief having acknowledged knowledge of the alleged conspiracy on October 11, 1985, the one (1) year statue of limitations, ran out on October 12, 1986.
>
> Counts I, II, III and VI are therefore time barred as to all Defendants mentioned therein. It is the further opinion of the Court that Defendant exhibit 3 (I) collaterally estops Plaintiffs from re-litigating the

question of fraud as it is alleged against the Defendants Bradley K. Haynes and B. K. Haynes Corporation who are therefore dismissed as parties Defendant to these actions.

Plaintiff's conceded in argument that the causes of action set out in counts I, IV and VI are time barred as to First Virginia Bank - Shenandoah Valley.

By these rulings the Court has ruled against the defendants on their Sec. 8.01-271.1 and Rule 3:3 arguments.

The Court will therefore invite counsel for further brief and argue their pleas and motions as they relate to the remaining parties and issues, which are:

Count V - Tortious interference with contract
The Estate of Nicholas C. Miller

Count VII - Common Law Conspiracy
First Virginia Bank - Shenandoah Valley
Charles R. Cash
The Estate of Nicholas Miller

Count VIII - Sec. 18.2-499 Conspiracy
First Virginia Bank - Shenandoah Valley
Charles R. Cash
The Estate of Nicholas Miller

Accordingly, it is ADJUDGED & ORDERED that:

1) The Defendants Bradley K. Haynes and B. K. Haynes Corporation, be and are hereby dismissed with prejudice, from these proceedings;

2) Counsel for the remaining Defendants shall brief the remaining counts within twenty-one days of September 5, 1990, at which time plaintiffs' counsel shall respond within fourteen days thereafter; with reply reserved to defendants seven day thereafter;

3) Counsel may thereupon place the matter on the next available Motions Day for argument, or, in the alternative, counsel may inform the Court that they do not desire to argue further orally and the Court will render its decision upon the basis of the briefs submitted . .

AND this cause is continued.
Entered this 10 day of October, 1990

/s/ James L. Berry
James L. Berry JUDGE

We ask for this:

/s/ Kermit L. Racey
Kermit L. Racey
Counsel for Bradley K. Haynes and B. K. Haynes Corporation

/s/ George W. Johston, III
George W. Johnston III
Counsel for Bradley K. Haynes and B. K. Haynes Corporation

SEEN AND OBJECTED TO:

/s/ Kathleen T. Barlow, ESQ.
Kathleen T. Barlow
Counsel for First Virginia Bank - Shenandoah Valley and Charles R. Cash

SEEN AND OBJECTED TO:
/s/ William E. Shmidheiser III
Counsel for the Estate of Nicholas C. Miller

SEEN AND OBJECTED TO:
/s/ Ralph L. Payne
Ralph L. Payne
Counsel for Donald R. Lamborne and Jean Lamborne and Marjec, Inc.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 4th day of November, 1992.

Donald R. Lamborne, et al.,

Appellants,

against Record No. 921009
Circuit Court Nos. L89-118 and L89-119

Bradley K. Haynes, et al.,

Appellees.

From the Circuit Court of Frederick County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,
Teste:
David B. Beach, Clerk
By: /s/
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 8th day of January, 1993.

Donald R. Lamborne, et al.,

Appellants,

against Record No. 921009
Circuit Court Nos. L89-118 and L89-119

Bradley K. Haynes, et al.,

Appellees.

Upon a Petition for Rehearing

On consideration of the petition of appellant Donald R. Lamborne to set aside the judgment rendered herein on the 4th day of November, 1992, and grant a rehearing thereof, the prayer of the said petition is denied.

Justice Whiting did not participate in the consideration of this case.

A Copy,
Teste:

/s/
Clerk

(2)

No. 92-1755

Supreme Court, U.S.
FILED
JUN 01 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

DONALD R. LAMBORNE, *et al.*,

Petitioners,

vs.

BRADLEY K. HAYNES, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

BRIEF IN OPPOSITION FOR RESPONDENTS ESTATE OF NICHOLAS C. MILLER, JOHN THORPE RICHARDS, EXECUTOR; FIRST VIRGINIA BANK-SHENANDOAH VALLEY AND CHARLES R. CASH, PRESIDENT; AND BRADLEY K. HAYNES AND B.K HAYNES CORPORATION

PHILLIP C. STONE
WILLIAM E. SHMIDHEISER, III
WHARTON, ALDIZER & WEAVER
Attorneys for Respondents Estate of Nicholas C. Miller, John Thorpe Richards, Executor; First Viriginia Bank - Shenandoah Valley and Charles R. Cash, President; and Bradley K. Haynes and B.K. Haynes Corporation
100 South Mason Street
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BEST AVAILABLE COPY

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No. 92-1755

In The

Supreme Court of the United States

October Term, 1992

DONALD R. LAMBORNE, *et al.*,

Petitioners,

vs.

BRADLEY K. HAYNES, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

BRIEF IN OPPOSITION FOR RESPONDENTS ESTATE OF NICHOLAS C. MILLER, JOHN THORPE RICHARDS, EXECUTOR; FIRST VIRGINIA BANK - SHENANDOAH VALLEY AND CHARLES R. CASH, PRESIDENT; AND BRADLEY K. HAYNES AND B.K. HAYNES CORPORATION

For purpose of this Opposition To Writ Of Certiorari, all of the Respondents have authorized the undersigned counsel to file this Brief on their behalf.

OPINIONS BELOW

Petitioner Donald R. Lamborne has failed to properly set forth the proceedings below. The Circuit Court of Frederick County, Virginia handed down partial summary judgment against Petitioners/Plaintiffs on October 10, 1990. That Order dismissed Counts I, II, III, and VI against all Respondents/Defendants on the grounds that the initial lawsuit was filed after the expiration of the one year statute of limitations on October 12, 1986. The court further opined that even if the one year statute of limitations had not run out, "it is the further opinion of the Court that Defendant Exhibit 3 (I) collaterally estops Plaintiffs from re-litigating the question of fraud as it is alleged against the Defendants Bradley K. Haynes and B. K. Haynes Corporation who are therefore dismissed as parties Defendant to these proceedings." The court invited counsel to further brief and argue their motions to dismiss Counts V, VII and VIII. The Order of October 10, 1990 was appealed by Petitioners to the Virginia Supreme Court, which remanded the matter without deciding as premature until all other aspects of the case were decided. After further briefing and argument, then, the Circuit Court issued its Opinion letter dated March 6, 1992, ruling that all other claims were also barred by the statute of limitations, and an Order Of Dismissal proceeded from that Opinion letter on April 21, 1992. It is this latter Opinion and Order which were the subject of the appeal and the Supreme Court of Virginia's decisions of November 4, 1992 and January 8, 1993.

STATEMENT OF JURISDICTION

Respondent Estate of Nicholas C. Miller respectfully suggests that the invocation of jurisdiction pursuant to Title 28 U.S.C. § 1257 is not appropriate, for no substantial federal questions are involved.

STATEMENT OF THE CASE

Petitioners proceed from a misunderstanding as to the reason why their case was dismissed by the Circuit Court of Frederick County, Virginia. Petitioners have the mistaken impression that their case was dismissed by the Circuit Court of Frederick County on the grounds that it was barred by *res judicata* and collateral estoppel. That is probably because the Respondent/Defendants argued vociferously before the Circuit Court that all the claims against them had been previously litigated, as indeed they had — but as can be seen from the March 6, 1992 Opinion Letter, the Circuit Court took the much easier path to dismissal, finding that all claims were barred by the applicable state statutes of limitation.

Petitioner Lambornes and their real estate development corporation, Marjec, Inc., both filed Chapter XI bankruptcy in September of 1978 to halt a foreclosure sale of the Marjec, Inc. real estate scheduled for the following day. From the beginning of the bankruptcy case the Estate of Nicholas C. Miller sought relief from the bankruptcy stay to foreclose on its collateral, consisting of 5,000 acres of mountain land west of Winchester, Virginia, and its attempts to do so were continually resisted by Lambornes. Throughout the case Lambornes represented to the Bankruptcy Court that salvation was "just around the corner," that they had a "ready, willing and able" lender, or buyer, which always required further delays to consummate. For seven years Lambornes continued to thwart the efforts of the Miller Estate to realize on its collateral by proffering one after another phantom source of funds. However, no actual money ever appeared.

On June 5, 1986 the Bankruptcy Court finally entered an Order For Relief From Stay allowing the foreclosure sale to proceed. Petitioner's primary complaint has been that the sale was inadequately advertised and sold for too little. The record in the Bankruptcy Court shows that the property was advertised through

direct mailing of over 4,000 multi-colored brochures to real estate developers in Pennsylvania, New Jersey, Maryland, Delaware, the District of Columbia, Virginia, West Virginia, Georgia, South Carolina, North Carolina, and Florida; and to all creditors and parties in interest of the Marjec, Inc. bankruptcy case; and to the auctioneer's own mailing list of persons generally interested in real estate in the Shenandoah Valley of Virginia. In addition, the property was advertised in the Winchester Evening Star in Frederick County, Virginia; in the Hampshire Review in Hampshire County, West Virginia; in the Herald Mail in Hagerstown, Maryland; in the Spirit of Jefferson in Charles Town, West Virginia; in the Baltimore Sun; in the Washington Post; and in the Wall Street Journal. Over 120 persons attended the sale, including radio and newspaper reporters and various attorneys for parties involved in the case. The weather was fine. B. K. Haynes Corporation was the high hidder on the real estate for $600,000, and First Virginia Bank - Shenandoah Valley ultimately financed the purchase.

The Order For Relief From Stay had provided that objections to the confirmation of the sale were to be filed no later than July 23, 1986. Petitioners filed no objections to the sale, and in fact Petitioners conceded in open court that the sale was conducted on July 10, 1986 in accordance with the Order For Relief From Stay entered on June 5, 1986. Atter the confirmation hearing before the Bankruptcy Court on July 30, 1986, *counsel for the Petitioners endorsed the Order Of Confirmation without objection.*

On August 14, 1986, the Petitioners filed a "Motion For Reconsideration," requesting the Bankruptcy Court to "reconsider" the decision confirming the sale. The Bankruptcy Court denied the Motion For Reconsideration.

Ultimately Petitioners appealed the Bankruptcy Court's decision to confirm the sale to the District Court for the Western

District of Virginia, and from there to the Fourth Circuit Court of Appeals. Both appellate courts affirmed the Bankruptcy Court's decision upholding the sale.

Accordingly, when the Petitioners filed their new lawsuit in the state court system, the parties Defendant argued vociferously that Petitioners' claims had already been litigated — and lost — in the federal system, and that the claims were barred by the statute of limitations. As can be seen from the decisions of the state court system, however, the state court proceeding was dismissed on the grounds that the Petitioners/Plaintiffs had filed their actions after they were time-barred by the appropriate statutes of limitation, while opining in *dictum* that even if they hadn't been barred by statute of limitations, they would have also been barred on grounds of collateral estoppel and *res judicata*, at least as to some of the Defendants.

Petitioners have not suggested that the state court was in error in holding that the state court action was barred by the state statute of limitations, nor that the state statute of limitations is repugnant to the Constitution, treaties or laws of the United States. Thus no federal question is presented.

CONCLUSION

For the reasons stated above, it is respecttully submitted that the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

PHILLIP C. STONE
WILLIAM E. SHMIDHEISER, III
WHARTON, ALDHIZER & WEAVER
Attorneys for Estate of Nicholas C. Miller, John Thorpe Richards, Executor; First Virginia Bank - Shenandoah Valley and Charles R. Cash, President; Bradley K. Haynes and B. K. Haynes Corporation
100 South Mason Street
P.O. Box 809
Harrisonburg, Virginia 22801
(703) 434-0316

Dated: May 28, 1993

APPENDIX A — ORDER OF THE SUPREME COURT OF VIRGINIA DENYING PETITION FOR REHEARING DATED JANUARY 8, 1993

Record No. 921009
Circuit Court Nos. L89-118 and L89-119

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 8th day of January, 1993.

Donald R. Lamborne, et al.,

Appellants,

-against-

Bradley K. Haynes, et al.,

Appellees.

Upon a Petition for Rehearing

On consideration of the petition of appellant Donald R. Lamborne to set aside the judgment rendered herein on the 4th day of November, 1992, and grant a rehearing thereof, the prayer of the said petition is denied.

Justice Whiting did not participate in the consideration of this case.

A Copy,

Teste:

s/ David B. Beach
Clerk

APPENDIX B — ORDER OF THE SUPREME COURT OF VIRGINIA DENYING PETITION APPEAL DATED NOVEMBER 4, 1992

Corrected Copy

Record No. 921009
Circuit Court Nos. L89-118 and L89-119

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond onWednesday the 4th day of November, 1992.

Donald R. Lamborne, et al.,

Appellants,

-against-

Bradley K. Haynes, et al.,

Appellees.

From the Circuit Court of Frederick County

Opon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

s/
David B. Beach, Clerk

By:
Deputy Clerk

APPENDIX C — ORDER OF DISMISSAL OF THE CIRCUIT COURT OF FREDERICK COUNTY, DATED APRIL 1, 1992

BOOK 80 PAGE 1052

VIRGINIA: IN THE CIRCUIT COURT OF FREDERICK COUNTY

At Law No. 89-118

DONALD R. LAMBORNE, et al.,

Plaintiff,

v.

FIRST VIRGINIA BANK - SHENANDOAH VALLEY, et al,

Defendants.

ORDER OF DISMISSAL

Upon due consideration of the issues between and among the parties and the briefs hereinbefore filed, it is the opinion of this Court as set out in its letter of March 6, 1992, a copy of which is attached hereto, that Counts V, VII, and VIII, which are the remaining Counts in this lawsuit, are all barred by the statute of limitations. Plaintiffs' Brief having acknowledged knowledge of the alleged conspiracy on October 11, 1985, the one-year statute of limitations ran out on October 12, 1986. Each party will bear own fees and costs.

Plaintiffs' objections on the grounds set out in their Briefs and arguments are noted.

ENTERED this 1 day of April, 1992.

s/ James L. Berry
Judge, Circuit Court of Frederick County

Appendix C

BOOK 80 PAGE 1053

SEEN:
s/ William E. Shmidheiser, III
William E. Shmidheiser, III
Counsel for the Estate of Nicholas C. Miller

s/ Kathleen T. Barlow
Kathleen T. Barlow
Counsel for Charles R. Cash and First Virginia Bank - Shenandoah Valley

SEEN AND OBJECTED TO;
s/ Ralph L. Payne
Ralph L. Payne
Counsel for Donald R. Lamborne and Jean Lamborne

STATE OF VIRGINIA
COUNTY OF FREDERICK, TO-WIT:

I, George B. Whitacre, Clerk Circuit Court of the County of Frederick, Va., do hereby certify that the foregoing is a true and correct copy of the Order of Dismissal as recorded in my office Law Order Book No. 80, Page 1052. Given under my hand the 7th day of May 1992, s/ Rebecca P. Hague Deputy.

APPENDIX D — LETTER OPINION DATED MARCH 6, 1992

March 6, 1992

Ralph Lucian Payne Esq.
117 North Fairfax Street
Alexandria, VA 22314

Kathleen T. Barlow, Esq.
6400 Arlington Blvd., Suite 420
Falls Church, VA 22942-2336

William E. Schmidheiser, III, Esq.
P.O. Box 809
Harrisonburg, VA 22801

Re: Donald R. Lamborne, et al. v. First Virginia Bank, et al.
Circuit Court of Frederick County - Law No. 89-118

Marjec, Inc. v. First Virginia Bank, et al.
Circuit Court of Frederick County - Law No. 89-119

Dear Counsel:

The matters remaining for determination in these cases are:

Count V - *Tortious Interference with Contract*
The Estate of Nicholas C. Miller

Count VII - *Common Law Conspiracy*
First Virginia Bank - Shenandoah Valley
Charles R. Cash
The Estate of Nicholas C. Miller

Appendix D

Count VIII - *§18.2-499 Conspiracy*
First Virginia Bank - Shenandoah Valley
Charles R. Cash
The Estate of Nicholas C. Miller

Having maturely considered the further argument and additional authorities cited by the parties relative to these remaining issues, it is the opinion of the Court that were it not for the fact that Count V is barred by the statute of limitations, the demurrer to Count V would have to be sustained on the authority of *Duggin v. Adams,* 234 Va. 221 (1987).

It appears to the Court, however, that both Counts V and VII are claims based on personal financial damage, not injury to property. Neither count alleges any "impact on the real property itself", but rather both allege "financial damages personal to the individual". *J.F. Toner & Son v. Staunton Prod. Credit,* 237 Va. 155 (1989). That being so, the statute of limitations applicable to Counts V and VII was one year and expired October 12, 1986 before the institution of these suits.

This Court has heretofore accepted the statute of limitations for Va. Code § 18.2-500 actions to be five years based on a case from the Eastern District of Virginia, *Federated Graphics Cos., v. Napotnik,* 424 F. Supp. 291 (E.D. Va. 1976). This result, however, was questioned by that court in *HMK Corp., v. Walsey,* 637 F. Supp. 710, 722 (E.D. Va. 1986) following the decision of the Virginia Supreme Court in *Pigott v. Moran,* 231 Va. 76 (1986). The reasoning in *Pigott,* amplified by *Toner,* now convinces this Court that the applicable statute of limitations for this cause of action is likewise one year and expired October 12, 1986.

Appendix D

I will ask Mr. Schmidheiser to prepare a Final Order in conformity with this opinion, noting plaintiff's objections on the grounds set out in their briefs and argument, for circulation for endorsement and submission to the Court for entry.

Sincerely,

s/ James L. Berry
James L. Berry

JLB/d

Original to Court File

APPENDIX E — ORDER OF THE SUPREME COURT OF VIRGINIA DATED MAY 8, 1991

Record No. 910030
Circuit Court Nos. L89-118 and L89-119

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 8th day of May, 1993.

Donald R. Lamborne, et al.,

Appellants,

-against-

First Virginia Bank-Shenandoah, et al.,

Appellees.

From the Circuit Court of Frederick County

Finding that the petition for appeal filed herein is premature, *see Wells v. Whitaker,* 207 Va. 616, 151 S.E.2d 422 (1966), the Court dismisses the petition for appeal without prejudice to the right of the appellants to reassert the same issues in an appeal from the final judgment entered in the underlying proceeding between Donald R. Lamborne, et al. and First Virginia Bank-Shenandoah, et al.

A Copy,

Teste:

David B. Beach, Clerk

s/
Deputy Clerk

APPENDIX F — ORDER OF THE CIRCUIT COURT OF FREDERICK COUNTY DATED OCTOBER 10, 1990

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VIRGINIA:

IN THE CIRCUIT COURT OF FREDERICK COUNTY

AT LAW NO. 89-118

DONALD R. LAMBORNE et al,

Plaintiffs

vs.

FIRST VIRGINIA BANK-SHENANDOAH VALLEY et al,

Defendants

AT LAW NO. 89-119

MARJEC, INC.,

Plaintiff

vs.

FIRST VIRGINIA BANK-SHENANDOAH VALLEY et al,

Defendants

ORDER

This matter came on to be heard August 15, 1990 upon the praecipe of Bradley K. Haynes and B. K. Haynes Corporation, upon due consideration of the issues between and among the parties and the briefs hereinbefore filed, it is the opinion of this

Appendix F

Court as set out in its letter opinion dated September 5, 1990 (a copy of which is attached hereto) that:

> Counts I, II, and III of Bill of Complaint designated a breaches of fiduciary duty as well as count VI all sound in fraud. Plaintiffs' brief having acknowledged knowledge of the alleged conspiracy on October 11, 1985, the one (1) year statue of limitations, ran out on October 12, 1986.
> Counts I, II, III and VI are therefore time barred as to all Defendants mentioned therein. It is the further opinion of the Court that Defendant exhibit 3 (I) collaterally estops Plaintiffs from re-litigating the question of fraud as it is alleged against the Defendants Bradley K. Haynes and B. K. Haynes Corporation who are therefore dismissed as parties Defendant to these actions.

Plaintiff's conceded in argument that the cause of action set out in counts I, IV and VI are time barred as to First Virginia Bank - Shenandoah Valley.

By these rulings the Court has ruled against the defendants on their Sec. 8.01-271.1 and Rule 3:3 arguments.

The Court will therefore invite counsel to further brief and argue their pleas and motions as they relate to the remaining parties and issues, which are:

Count V - Tortious Interference with Contract
The Estate of Nicholas C. Miller

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Count VII - Common Law Conspiracy
First Virginia Bank - Shenandoah Valley
Charles R. Cash
The Estate of Nicholas C. Miller
Count VIII - §18.2-499 Conspiracy
First Virginia Bank - Shenandoah Valley
Charles R. Cash
The Estate of Nicholas C. Miller

Accordingly, it is ADJUDGED & ORDERED that:

1) The Defendants Bradley K. Haynes and B.K. Haynes Corporation, be and are hereby dismissed with prejudice, from these proceedings;

2) Counsel for the remaining Defendants shall brief the remaining counts within twenty-one days of September 5, 1990, at which time plaintiffs' counsel shall respond within fourteen days thereafter; with reply reserved to defendants seven days thereafter;

3) Counsel may thereupon place the matter on the next available Motions Day for argument, or, in the alternative, counsel may inform the Court that they do not desire to argue further orally and the Court will render its decision upon the basis of the briefs submitted..

AND this cause is continued.
Entered this 10 day of October, 1990

s/ James L. Berry
James L. Berry JUDGE

Appendix F

We ask for this:

s/ Kermit L. Racey
Kermit L. Racey
Counsel for Bradley K. Haynes and B. K. Haynes Corporation

s/ George W. Johnson
George W. Johnson III
Counsel for Bradley K. Haynes and B.K. Haynes Corporation

SEEN AND OBJECTED TO:

s/ Kathleen T. Barlow
Kathleen T. Barlow, ESQ.
Counsel for First Virginia Bank-Shenandoah Valley and Charles R. Cash

SEEN AND OBJECTED TO:

s/ William E. Shmidheiser III
William E. Shmidheiser III
Counsel for the Estate of Nicholas C. Miller

SEEN AND OBJECTED TO:

s/ Ralph L. Payne
Ralph L. Payne
Counsel for Donald R. Lamborne and Jean Lamborne and Marjec, Inc.

APPENDIX G — LETTER OPINION DATED SEPTEMBER 5, 1990

September 5, 1990

Ralph Lucian Payne Esquire
117 North Fairfax Street
Alexandria, Virginia 22314

Kermit L. Racey, Esquire
115 West Court Square
Woodstock, Virginia 22664

George W. Johnson, III, Esquire
Post Office Box 2740
Winchester, Virginia 22601

Brian D. Pedati, Esquire
6400 Arlington Boulevard
Falls Church, Virginia 22046

William E. Schmidheiser, III, Esquire
Post Office Box 809
Harrisonburg, Virginia 22801

Re: Donald R. Lamborne, et al. v. First Virginia Bank, et al . - Law No. 89- 1 1 8 and Marjec, Inc., v. First Virginia Bank et al. - Law No. 89-119

Gentlemen:

With apologies for the protracted consideration of this multi-faceted litigation, having made certain determinations I have decided to issue those determinations and invite further briefs and argument as to those matters remaining undecided with a view toward simplifying and focusing the issues.

Appendix G

It is the opinion of the Court that counts I, II and III, designated broaches of fiduciary duty, as well as count VI all sound in fraud. Plaintiffs' brief having acknowledged knowledge of the alleged conspiracy on October 11, 1985, the one year statute of limitations, ran on October 12,1986.

Counts I, II, III and VI are therefore time barred as to all defendants mentioned therein.

It is the further opinion of the Court that defendants' exhibit 3(I) collaterally estops plaintiffs from re-litigating the question of fraud as it is alleged against defendants Bradley K. Haynes and B. K. Haynes Corporation who are therefore dismissed as parties defendant to these actions.

Plaintiff conceded in argument that the causes of action set out in counts I, IV and VI are time barred as to First Virginia Bank Shenandoah Valley.

By these rulings the Court has ruled against the defendants on their § 8 .01-271.1 and Rule 3:3 arguments.

The Court will therefore invite counsel to further brief and argue their pleas and motions as they relate to the remaining parties and issues, which are:

Count V - *Tortious interference with contract*
The Estate of Nicholas C. Miller

Count VII - *Common law Conspiracy*
First Virginia Bank - Shenandoah Valley
Charles R. Cash
The Estate of Nicholas C. Miller

Appendix G

Count VIII - *§ 18. 2-499 Conspiracy*
First Virginia Bank - Shenandoah Valley
Charles R. Cash
The Estate of Nicholas C. Miller

The Court will ask counsel for the remaining defendants to file their briefs with respect to the remaining counts within twenty-one days of the date of this letter, following which plaintiffs' counsel may respond within fourteen days, and defendants may respond thereto within seven days thereafter.

Counsel may thereafter place the matter on a Motions Day for argument, if they wish, or may inform the Court that they do not desire to argue further orally and the Court will render its decision from the briefs submitted.

Sincerely,

s/ James L. Berry
James L. Berry

JLB/d

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